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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DAVID TAHIRY et al.,

Plaintiffs and Appellants,

v.

JAMES C. HANN et al.,

Defendants and Respondents.

A153291

(Alameda County
Super. Ct. No. HG16831121)

David Tahiry and Mohammad Tahir Kakar (Tahiry and Kakar) appeal a judgment of dismissal after the trial court sustained a demurrer to their third amended complaint. Tahiry and Kakar alleged James C. Hann and his law firm (Hann) committed legal malpractice and breached duties to them by removing a lis pendens on property. The court sustained Hann's demurrer because Tahiry and Kakar failed to allege they suffered damages. We agree and affirm.

FACTUAL AND PROCEDURAL HISTORY

On September 14, 2016, Tahiry and Kakar filed a complaint alleging Hann breached duties to them as their attorney by temporarily removing a lis pendens on real property on Buttner Road in Pleasant Hill, California (the Buttner Property). On October 18, 2016, Tahiry and Kakar filed their first amended complaint (FAC) making similar allegations against Hann. The court sustained a demurrer to the FAC with leave to amend.

Tahiry and Kakar filed their second amended complaint (SAC) on February 14, 2017, alleging causes of action against Hann for breach of the duty of loyalty, breach of the covenant of good faith and fair dealing, and legal malpractice. The court sustained a demurrer to the SAC with leave to amend for Tahiry and Kakar “to clearly allege facts demonstrating how they have been damaged by the removal of the lis pendens on the subject property between February 1 and March 21, 2016.” The court noted the limited liability company operating agreement (the LLC Agreement) attached as exhibit 2 to the SAC indicated Tahiry and Kakar contributed \$620,000 to acquire membership interests in the limited liability company (LLC) that held title to the Buttner Property. Because Tahiry and Kakar did not own the Buttner Property, it was not clear how they were damaged by Hann’s temporary removal of the lis pendens on the property. Nonetheless, the court provided Tahiry and Kakar an opportunity to amend the SAC “to clearly allege facts demonstrating how they have been damaged by Hann’s agreement to release the lis pendens on the subject property for that seven week period.”

On May 23, 2017, Tahiry and Kakar filed their third amended complaint (TAC) against Hann for breach of the duty of loyalty, breach of the covenant of good faith and fair dealing, and legal malpractice. This time, the court sustained Hann’s demurrer without leave to amend. Based on the LLC Agreement and a grant deed attached to the TAC, it was clear to the court that the LLC, not Tahiry and Kakar, owned the Buttner Property. As a result, the court determined Hann’s expungement of the lis pendens on the Buttner Property did not cause Tahiry and Kakar to suffer damages. The court subsequently entered a judgment of dismissal. Tahiry and Kakar appeal.

DISCUSSION

On appeal, Tahiry and Kakar contend their TAC “patently states a claim for damages.” They claim they “went from being half-owners of an LLC that owned property worth \$400,000–\$600,000, to half-owners of an LLC that no longer owned anything. That, by definition, constitutes damages.” We disagree.

I.

Standard of Review

On review of an order sustaining a demurrer, “we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose.” (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) “We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law.” (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We look “only to the face of the pleadings and to matters judicially noticeable and not to the evidence or other extrinsic matter.” (*Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 239, fn. 2, italics omitted.) We construe the complaint liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We must determine de novo whether the factual allegations are adequate to state a cause of action under any legal theory. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

II.

Tahiry and Kakar Cannot Allege That Hann’s Conduct Damaged Them

Based on our de novo review of the allegations in the TAC, as well as the exhibits attached to the TAC, we conclude Tahiry and Kakar cannot allege they suffered damages as a result of the attorney’s alleged misconduct.

The elements of a claim for legal malpractice are: “(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney’s negligence.” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) The elements of a cause of action for breach of fiduciary duty include “damage proximately caused by the breach.” (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) Similarly, to state a claim for breach of the implied covenant, a plaintiff must allege damages resulting from the conduct that unfairly interfered with the plaintiff’s

right to receive the benefits of the contract. (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614; *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032.)

Liberalizing the allegations of the TAC, Tahiry and Kakar allege they were defrauded out of \$620,000 by Shariq Mirza and others. However, this lawsuit concerns their allegations against their attorney in the underlying action, not their claims against Mirza and others. Tahiry and Kakar allege that by temporarily removing a lis pendens from the Buttner Property, Hann made it possible for Mirza to obtain a new loan secured by the Buttner Property, but no payments were made on that loan, and the lender “has taken steps to commence foreclosure on” the Buttner Property. In their opening brief, Tahiry and Kakar further explain that Hann’s release of the lis pendens “proximately caused Mirza’s extraction of at least \$150,000 from the equity in the Buttner [P]roperty, then the total loss to foreclosure of that property—the sole asset of the LLC in which Plaintiffs owned a fifty per cent interest.”

The problem for this argument is that Tahiry and Kakar allege the LLC owned the Buttner Property. They allege they were “enticed” into believing they obtained ownership interests in the property, when in fact they merely obtained membership interests in the LLC; these allegations appear to be the basis for their claim of fraud against Mirza and others in the underlying action. But in this action against their attorney, they allege they “each received not a 25% personal interest in legal title to the property, but instead a 25% interest in the LLC,” allegations supported by the exhibits attached to the TAC, including the LLC Agreement, and a grant deed showing that ownership of the property was transferred to the LLC.

Members of an LLC “hold no direct ownership interest in the company’s assets.” (*PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964.) As a result, “the members cannot be directly injured when the company is improperly deprived of those assets.” (*Ibid.*) When the alleged injury is “essentially a diminution in the value of their membership interest in the LLC occasioned by the loss of the company’s assets,” then the injury is “incidental to the injury suffered by” the LLC.

(*Id.* at p. 964.) Causes of action based on this alleged injury must be pled as derivative, not personal, causes of action. (*Id.* at pp. 965–966.)

Here, Hann’s temporary removal of the lis pendens on the Buttner Property caused no direct harm to Tahiry and Kakar. The LLC, not Tahiry and Kakar, owned the Buttner Property. Accordingly, the court did not err in sustaining Hann’s demurrer. (*PacLink Communications Internat., Inc. v. Superior Court*, *supra*, 90 Cal.App.4th at pp. 965–967 [issuing writ of mandate compelling court to enter order sustaining demurrer to causes of action that could not be asserted as part of an individual action because they alleged direct injury to the LLC, and only incidental injury to the LLC members].)¹

In an effort to circumvent this problem, Tahiry and Kakar allege they own “an equitable interest” in the Buttner Property. They argue Hann’s conduct damaged them: when the private lender foreclosed on the Buttner Property, their “\$620,000 investment, and all equity which might have provided any security for a recovery on their part, were entirely wiped out.” To the extent we understand these arguments, Tahiry and Kakar contend their attorney’s conduct made it more difficult for them to enforce a future money judgment against Mirza and others in the underlying action. They also contend Hann’s “voluntary release” of the lis pendens “substantially diminished Plaintiffs’ bargaining power in the underlying lawsuit.” However, a cause of action against an attorney for breach of a professional duty cannot be based on “ ‘speculative harm, or the threat of future harm[.]’ ” (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130.)

Tahiry and Kakar argue the court committed “errors of law” in ruling they lacked standing to maintain a lis pendens in the underlying action. We do not address these arguments in any detail because even if Tahiry and Kakar had standing to maintain a lis pendens on the Buttner Property, they cannot allege they were directly harmed by Hann’s temporary removal of it. (*PacLink Communications International, Inc. v. Superior Court*, *supra*, 90 Cal.App.4th at pp. 965–967.)

¹ We offer no opinion on whether Tahiry and Kakar could have filed a derivative action against Hann for legal malpractice.

Tahiry and Kakar argue they “received . . . a property interest” in the Buttner Property based on section 11.17 of the LLC Agreement, which provides that Tahiry and Kakar “are investing \$620,000 through which all costs including labor, material, permits, and ownership stake in this real property are considered paid in full. If in any event any additional costs related to the construction of this real property arise, it is agreed that member Shariq Mirza shall cover that additional expense.” By its plain terms, this section addresses the costs of constructing a residence on the Buttner Property. The grant deed attached to the TAC shows that ownership of the Buttner Property was transferred to the LLC, not to Tahiry and Kakar. Because they cannot allege Hann’s conduct caused them direct harm, the court did not err in sustaining Hann’s demurrer to the TAC without leave to amend.²

DISPOSITION

We affirm. Hann is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

² We deny Tahiry and Kakar’s motion for judicial notice. Tahiry and Kakar request we consider an order from the underlying action to show they were not estopped “from claiming that they were defrauded into accepting membership interests in an LLC as opposed to the personal real estate ownership they had been promised.” We question whether this is an accurate characterization of Hann’s argument regarding “judicial admissions.” In any event, we resolve this appeal without relying on Hann’s argument. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089, fn. 4.)

Jones, P.J.

WE CONCUR:

Simons, J.

Needham, J.

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